

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/39680

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED. YES

  
.....  
B.C. WANLESS

8 February 2023

In the matter between:

**MICHAEL ROBERT HULL**

Applicant

and

**THE FREE MARKET FOUNDATION (SOUTHERN AFRICA)**

First Respondent

**REX VAN SCHALKWYK**

Second Respondent

**ROBERT WASSENAAR**

Third Respondent

**EUSTACE DAVIE**

Fourth Respondent

**RUMBIDZAI KANGARA**

Fifth Respondent

**LOUW LOUW**

Sixth Respondent

**TERRY MARKMAN**

Seventh Respondent

**JOHANNA McDOWELL**

Eighth Respondent

**GERHARD PAPENFUS**

Ninth Respondent

**ROBERT VIVIAN**

Tenth Respondent

**GAIL DAUS-VAN WYK**

Eleventh Respondent

<b>THERESA EMERICK</b>	Twelfth Respondent
<b>WILHELM HERTZOG</b>	Thirteenth Respondent
<b>TEMBA NOLUTSHUNGU</b>	Fourteenth Respondent
<b>LAWRENCE MAVUNDLA</b>	Fifteenth Respondent

*This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for handing down is deemed to be 10h00 on 8 February 2023.*

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## JUDGMENT

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### **WANLESS AJ**

#### **Introduction**

- [1] This is an application for costs in terms of subrule 41(1)(c) of the Uniform Rules of Court. The application has been instituted by **THE FREE MARKET FOUNDATION (SOUTHERN AFRICA)** ("the Foundation") against one **MICHAEL ROBERT HULL** ("Hull").
- [2] The Foundation was founded in response to the apartheid regime's policies of economic interventionism. It campaigned extensively for the removal of restrictions on the movement and use of labour, capital and goods, across South Africa, with a view to allowing people of all races to compete freely in all sectors of economic life. It held its inaugural congress in 1977, where a call was made for the removal of racially discriminatory laws and the adoption of a free enterprise system. In addition to its research and lobbying for a more just economic dispensation in the 1980's the Foundation also led the liberalisation of the economy.
- [3] In addition the Foundation played a role in ending apartheid and in the adoption of the interim and present Constitution. The property rights and limitations provisions as encompassed in sections 25 and 36 of the Constitution of South Africa 1996, owe their existence, at least in part, to the efforts of the Foundation's representatives. At present the Foundation maintains a high public profile through media and social media engagement and through regular submissions to Parliament on proposed legislation.
- [4] One of the Foundation's most important projects is its Khaya Lam (My Home) Land Reform Project. Initiated in 2010 in the Free State but now replicated in other parts of South Africa the project aims to have all council-owned properties in South Africa

(approximately 5 million) upgraded to full freehold title at no cost to the lawful residents. By providing title deeds the Khaya Lam Project gives the landless a stake in the economy and the future of South Africa. At the time that this matter came before this Court, over 10 000 transfers had been affected or were in the process of being effected and the Foundation had secured private sector funding for an additional 20 000 transfers.

- [5] The history of the Foundation and its contribution to the betterment of South Africa and its citizens is truly remarkable. Against this background the events which took place at the Foundation's annual general meeting on the 29<sup>th</sup> of July 2020 are most regrettable. Moreover, the events that have transpired thereafter and the very fact that this Court has been called upon to determine issues of costs arising as a result of disputes between Foundation members, is not only regrettable but is in stark contrast to the core values of the Foundation and the principles which it has so proudly defended.

### **The facts**

- [6] Prior to the 29<sup>th</sup> of July 2020 various factions within the membership of the Foundation had become embroiled in certain disputes. This judgment will not be burdened unnecessarily by dealing with the nature of those disputes, particularly in light of the fact that the sole issue which this Court has been asked to determine is that of costs.
- [7] The annual general meeting ("the AGM") of the Foundation held on the 29<sup>th</sup> of July 2020 was, looked at objectively, chaotic. Whether or not it resulted in a lawful election of the Foundation's Board is not for this Court to determine. It is simply necessary to note, at this stage, that Hull (a member of the Foundation and who was present at the AGM) was, at all material times, of the opinion that the Board elected at the AGM was illegitimate.
- [8] On or about the 21<sup>st</sup> of July 2021, notice was given to the Foundation's members that a special general meeting ("the SGM") had been called for the 19<sup>th</sup> of August 2021 for the purposes of voting on the adoption of certain proposed amendments to the Foundation's Constitution. Hull attended the SGM and proposed a motion that the SGM be adjourned since an application ("the main application") was about to be issued. He explained to the meeting that in the main application relief would be sought from this Court, *inter alia*, declaring that any amendments to the Constitution and restrictions these would impose on voting at general meetings, would be null and void since they would be passed by an illegitimate Board. In the premises, he advised the members that, based on what he believed, it would be in the interests of all the members of the Foundation that the legitimacy of the Board be determined *before* any amendments to the Constitution took effect and explained that it was critical that the legitimacy of the Board was resolved prior to the 2021 AGM.

- [9] At the end of the day, no amendments were effected to the Constitution and the main application was instituted, in this Court, on or about the 20<sup>th</sup> of August 2021. In the main application Hull was the Applicant; the Foundation was the First Respondent and the remaining fourteen (14) respondents were the members of the Board. Only the Foundation opposed the relief sought by Hull in the main application.
- [10] The litigation then took its course. On the 4<sup>th</sup> of October 2021, Hull gave notice of his intention to amend his Notice of Motion. The application to amend was unopposed and Hull tendered to pay the costs occasioned by the application. Hull applied for an order striking out specific sections of the answering affidavit and some of the confirmatory affidavits filed by the Foundation. The Foundation also instituted an interlocutory application whereby it sought an order that certain sections of Hull's founding and replying affidavits be struck out.
- [11] On the 18<sup>th</sup> of November 2021 the Foundation's 2021 AGM was held at which a new Board was duly elected. It is common cause between the parties that this event resulted in both the main application and the interlocutory applications in respect thereof becoming moot.
- [12] Following the foregoing and on or about the 1<sup>st</sup> of December 2021 the Foundation served and filed a supplementary affidavit in the main application. In addition thereto, on or about the 10<sup>th</sup> of January 2022, the Foundation applied to the Deputy Judge President, Gauteng Division (Johannesburg) for the main application to be certified of a commercial nature and heard in the commercial court. This application was dismissed.
- [13] On or about the 10<sup>th</sup> of March 2022 the Foundation filed Heads of Argument in respect of the main application wherein the merits of the main application were dealt with at length.
- [14] Hull withdrew the main application formally in terms of subrule 41(1)(a) on or about the 23<sup>rd</sup> of March 2022. This withdrawal of the main application did not include a tender to pay the Foundation's costs.
- [15] On or about the 7<sup>th</sup> of April 2022 the Foundation instituted the present application in terms of subrule 41(1)(c) for costs. This resulted in a full blown application for costs which was heard by this Court, as an opposed motion, on the 18<sup>th</sup> of October 2022.

### **The Foundation's case**

- [16] In the first instance, the Foundation relies on the general principle that a litigant who withdraws legal proceedings must pay the costs occasioned thereby unless there are very sound reasons as to why the other party should not be entitled to costs. The Foundation also seeks a costs order on a punitive scale on the basis that, *inter alia*,

the main application never had any prospects of success. As such, it is submitted, it falls within the extended meaning of being “vexatious” and the Foundation further submits that this Court should, in its discretion, order that Hull pay the costs on the scale of attorney and client.

- [17] Arising from (and related to) the foregoing, it was also submitted on behalf of the Foundation that the main application was, in effect, a review proceeding despite the manner in which it had been styled. As such, the actual relief sought was to set aside an administrative action taken by the Foundation and as defined by the *Promotion of Administrative Justice Act 3 of 2000* (“PAJA”). It is averred by the Foundation that the manner in which Hull styled the main application was in fact intentional and not an error. This submission is based on the fact that subsection 7(1) of PAJA contains a time limitation of 180 days. In the premises, the Foundation submits that Hull brought the main application outside of PAJA to avoid non-compliance with the aforesaid subsection of PAJA. Hence, it is submitted that not only would the main application have been dismissed but, in light of Hull’s devious actions as aforesaid, costs should be awarded on the higher or punitive scale. A cost order is sought by the Foundation in respect of the main application; the interlocutory applications referred to above and the present application in terms of subrule 41(1)(c) on the scale of attorney and client, such to include the costs of two Counsel.
- [18] A further ground initially relied upon by the Foundation was the so-called “doctrine of laches” premised on the basis that Hull would not have been entitled to any relief in the main application in light of the delay in instituting the main application and the prejudice caused thereby to the Foundation. This ground was expressly abandoned by the Foundation at the hearing of this matter by Counsel for the Foundation on the basis that this doctrine has no applicability in our law.
- [19] The *actual* order sought by the Foundation in this matter, reads as follows:
- (a) *The Applicant pay the costs in respect of the above application on the scale as between attorney and client including the costs of two Counsel which costs shall include those related to the interim<sup>1</sup> applications brought by the Applicant and Respondent respectively and the costs connected with the filing by the First Respondent of its supplementary affidavit dated the 1<sup>st</sup> December 2021 but excluding those costs related to (the) application by the Applicant for case management.*
- (b) *The Applicant further pay the costs of this application on the scale as between attorney and client including the costs of two Counsel. “*

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<sup>1</sup> *It shall be presumed that the use of the word “interim” in the order prepared on behalf of the Foundation is an error and what was actually referred to were the interlocutory applications instituted by the parties and dealt with in this judgment.*

### Hull's case

- [20] It was submitted on behalf of Hull that the overriding principle in respect of costs is that all costs, unless expressly otherwise enacted, are in the discretion of the Court. Further, it was submitted that the provisions of subrule 41(1)(c) in no way fetters this Court's discretion in respect of costs. More particularly, it was submitted on behalf of Hull that once the main application became moot then neither party should have taken any further steps in the litigation process thereby avoiding incurring any further legal costs.
- [21] As to the submissions made by the Foundation that the main application had no prospects of success since it should have been brought in terms of PAJA, it was submitted that PAJA was never applicable since the election of the Foundation's Board was not an "administrative action" as defined by PAJA.
- [22] The *actual* order sought on behalf of Hull, reads as follows:

- "(a) *each party is to pay its own costs in the main application, save for the costs occasioned by the applicant in the main application's amendment of its notice of motion, which shall be paid by that (sic) applicant;*
- (b) *the application in terms of Rule 41(1)(c) is dismissed with costs as occasioned by the employment of two counsel".*

### The law

- [23] Subrule 41(1) reads as follows:

- "(a) *A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent between the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.*
- (b) .....
- (c) *If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."<sup>2</sup>*

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<sup>2</sup> *Emphasis added.*

[24] As was submitted by Adv Whitcutt SC (on behalf of Hull) it is trite but nevertheless an important general principle to bear in mind, particularly in the present matter, that the overriding principle in respect of costs is that they are in the discretion of the Court.<sup>3</sup>

[25] The correct approach to costs in matters that become moot was succinctly dealt with by the court in the matter of *Serwada v Minister of Home Affairs for RSA*<sup>4</sup> where it was held:

*"It seems to me that the Court is not confronted with an ordinary situation of a concession on the merits made through the withdrawal of the application. That the withdrawing party should bear the costs cannot be regarded as a hard and fast rule in this case. The court has a general jurisdiction to make a proper allocation of costs in the exercise of its judicial discretion.....*

*The Court must then evaluate the conduct of the parties which is relevant to costs".<sup>5</sup>*

[26] It was further held in *Serwada*<sup>6</sup> that the relevant considerations in such a case are (a) the merits of the application; (b) the manner in which the parties conducted themselves (elsewhere described as the reasonableness of the parties' conduct)<sup>7</sup> and (c) whether any party took unnecessary steps or adopted a wrong procedure.

[27] This Court not only accepts the correctness of the principles as enunciated in *Serwada* but intends to apply same, insofar as they are applicable, in the present matter.

#### **The application of the "Serwada principles" to the facts of the present matter**

##### **The merits of the main application**

[28] Both parties are critical of one another in respect of the institution of the main application and the opposition to the relief sought therein. On the one hand, Adv Davis SC (on behalf of the Foundation) criticises Hull for the delay in instituting the main application and defends the right of the Foundation to oppose the relief sought by Hull in that application since, it is submitted, the relief sought went to the very core of the manner in which the Foundation functioned. On the other hand, Adv Whitcutt SC criticised the Foundation for defending the indefensible (the invalidity of the election of the Board); being the only party to oppose the application (none of the remaining

<sup>3</sup> *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 69 (Innes J); *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A); *Weare v Ndebele* 2009 (1) SA 600 (CC) 623.

<sup>4</sup> [2011] JOL 27643 (ECM).

<sup>5</sup> *Ibid. paragraphs 4 – 5. Also see Erasmus v Grunow en n Ander* 1980 (2) SA 793 (O) 798 – 799A.

<sup>6</sup> At paragraph 10.

<sup>7</sup> *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Eastern Cape* 2005 (6) SA 123 (ECD) 129B-E.

respondents did so) and defended the right of Hull to institute the main application in light of, *inter alia*, the important role the Foundation plays in South African society which made the functioning; integrity, together with the sanctity of its constitution and voting procedures, worth preserving. The aforesaid is merely a summary of the situation leading up to the institution of and the opposition to the main application and the attitudes of the respective parties.

- [29] Insofar as the *actual* merits of the main application are concerned, namely whether or not the Foundation's Board was validly elected at the AGM, it is the opinion of this Court that it is unnecessary for this Court, when deciding the present application in terms of subrule 41(1)(c), to reach a final decision with regard thereto. The reasons therefor are as set out hereunder.
- [30] In the first instance, there is potentially a genuine and *bona fide* dispute of fact on the application papers before this Court as to whether the proceedings at the AGM gave rise to a validly elected Board or not. As such, it may not be possible for this Court to determine, as a fact, whether, *inter alia*, the requirements of the Foundation's constitution and the common law in respect of the convening of a lawful AGM and election of members to the Board, were satisfied. In that event, it becomes unnecessary for this Court to decide, as a matter of law, whether the election of the Board at the AGM should be classified as an administrative action and the consequences thereof (if any) insofar as this may relate to the issue of costs.
- [31] In the opinion of this Court, the decision not to enter into the factual disputes and deal with the points of law surrounding the unfortunate incidents which took place at the AGM (thereby also not burdening this judgment unnecessarily) is supported by the fact that whilst this Court accepts that all of the considerations as set out in *Serwada* may be important considerations in an application where proceedings have been withdrawn as a result of being overtaken by circumstances and becoming moot, every case must be judged on its own particular facts and circumstances. In one case the consideration of the merits of the withdrawn proceedings may not only be capable of simple and speedy resolution by the Court but may also be the determining factor in considering an application of this nature. In another case, for one reason or another, it may not be possible for the Court to decide the merits of the withdrawn proceedings at all. In other matters involving the withdrawal of proceedings as a result of mootness and the necessity to decide the issue of costs, it may be either (or both) of the considerations of the conduct of the parties or whether any party took unnecessary steps or adopted a wrong procedure, that necessitates a court placing more or less emphasis on one or more of the considerations as listed in *Serwada*. This Court understands the decision of *Serwada* to postulate certain broad considerations which should be taken into account by the Court in applications of this nature. It could never have been the intention of the Court in *Serwada* to limit or restrict a Court to those considerations only and further, not to have had in mind, when outlining those considerations for the benefit of other courts to follow, that each case will have its own

peculiar facts and circumstances to which these various considerations should be applied. To have done so (attempt to restrict a court to certain considerations only) would have flown directly in the face of the well-established principle of the general and unfettered discretion vested in the Court in respect of the issue of costs.<sup>8</sup>

- [32] That said, it is further the opinion of this Court that the remaining considerations to be applied to the facts of the present matter are far more relevant when considering the issue of costs in terms of the subrule 41(1)(c) application instituted by the Foundation.

**The manner in which the parties conducted themselves and whether any party took unnecessary steps or adopted a wrong procedure.**

- [33] As should be clear from that already stated in this Judgment, this Court will focus on the manner in which the parties conducted themselves *post* the event which caused the relief sought by Hull in the main application to become moot. For the reasons already dealt with by this Court, it is the opinion of this Court that the conduct of the parties prior thereto is of much lesser significance, having particular regard both to the nature of this application and, once again, the extensive and complex dispute of fact in the main application pertaining to the “in-fighting” which had taken place between the various factions of the Foundation’s membership.
- [34] Regarding the structure of this judgment, it would have become evident that this Court has elected to essentially consolidate the consideration of conduct with that of the taking of unnecessary steps and the following of wrong procedure. This is because, in the present matter, they are one and the same. In other matters, with different facts, a distinction between the two may be drawn. In the present matter, it is not convenient to attempt to do so. It would also, in the opinion of this Court, be incorrect to attempt to do so on the facts placed before this Court.
- [35] It is common cause in this application that when the new Board was elected at the AGM held on the 18<sup>th</sup> of November 2021 the relief sought in the main application and the interlocutory applications ancillary thereto, became moot. Thereafter, it is further common cause that the Foundation served and filed a supplementary affidavit in the main application. No explanation has been provided to this Court, on behalf of the Foundation, as to why, when the Foundation and the Foundation’s legal representatives knew (or ought reasonably to have known) that the main application had now been overtaken by events, the Foundation nevertheless elected to increase costs by serving and filing the said supplementary affidavit.
- [36] In addition thereto, it is further common cause that the Foundation applied to the Deputy Judge President, Gauteng Division (Johannesburg) for the main application to be certified to be of a commercial nature and heard in the commercial court. This

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<sup>8</sup> Paragraph [24] *ibid*; footnote 3 *ibid*.

application was dismissed. Once again, it appears that no explanation has been provided by the Foundation for this inexplicable behaviour of proceeding with the main application as if the main application was, for all intents and purposes, "alive and well".

- [37] To make matters worse the Foundation then proceeded to file Heads of Argument in respect of the main application. This is also common cause in the present application. It was pointed out to this Court by Counsel for Hull that the merits of the main application are dealt with at length in these Heads of Argument. As far as this Court is aware, this has not been seriously disputed by the Foundation in this application.
- [38] Shortly after the filing of the Heads of Argument by the Foundation, Hull formally withdrew the main application by way of the requisite notice in terms of rule 41. It was submitted by Counsel appearing on behalf of Hull that he did so in an attempt to bring a halt to the flood of unnecessary litigation which was continuing to come forth from the Foundation despite the fact that the relief sought in the main and interlocutory applications had become moot.

## Conclusion

- [39] This Court has an unfettered discretion (to be exercised judicially) to make an award in respect of costs in an application in terms of subrule 41(1)(c) and this discretion is not restricted, in any way, by previous decisions<sup>9</sup> where it has been held that a party who withdraws an action should be held liable for costs as an unsuccessful litigant,<sup>10</sup> or that a litigant who withdraws an action must show "very sound reasons"<sup>11</sup> or "exceptional circumstances"<sup>12</sup> not to pay costs. Further, it is clear that the distinguishing factor in the present case is that the relief sought in the main application and the interlocutory applications became moot. Hence, other considerations, as dealt with in, *inter alia*, *Serwada*, must apply when this Court exercises its discretion.
- [40] The conduct of the Foundation pursuant to the AGM on the 18<sup>th</sup> of November 2021 is difficult to understand. This is particularly so in light of the failure of the Foundation to explain that conduct either satisfactorily or at all. In the absence of a proper explanation in respect thereof the only reasonable inference this Court can make (and is entitled to make on the facts placed before it) is that the steps taken by the Foundation after the 18<sup>th</sup> of November 2021 were either done intentionally (in order to mulct Hull with costs) or negligently. Either way the conduct of the Foundation and the unnecessary steps taken, had that precise effect.

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<sup>9</sup> *Cronje v Pelser* 1967 (2) SA 589 (A) at 593.

<sup>10</sup> *Germishuys v Douglas Besproeingsraad* 1973 (3) SA 299 (NC); *Waste Products Utilization (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A.

<sup>11</sup> *Germishuys v Douglas Besproeingsraad* 1977 (3) SA 299 (NC) at 300D – E.

<sup>12</sup> *Master Blaster (Pty) Ltd v Sasol Dyno Nobel (Pty) Ltd* [2020] JOL 48140 (GP) par. 15. and *Tshabalala v Motloung* 2020 JOL 49124 (FB) at paragraph 8.

- [41] Even the manner in which the present application in terms of subrule 41(1)(c) was instituted is a matter of concern to this Court. As correctly pointed out during the course of argument by Adv Whitcutt SC the Foundation served a notice in terms of the relevant subrule accompanied by an affidavit. It has long been held that an applicant for an order for costs need only deliver a notice of his intention to ask for an order as to costs and no affidavit is required since the relevant material is already before the Court. A respondent is then entitled to oppose the application and place an affidavit before the court setting out the grounds for his opposition if the facts therefor are not clear from the main application.<sup>13</sup> By electing to institute the application in the manner that it did the Foundation greatly increased the costs in this matter in that not only did this result in a full set of affidavits being filed and served but an opposed application being placed before this Court with all of the consequent costs attached thereto. These costs would have included, *inter alia*, the drafting of Practice Notes; Chronologies and Heads of Argument. To the foregoing must obviously be added the costs of the legal representation present at court to argue the matter on the opposed roll. Apart from the attorneys representing the Foundation and Hull, both parties were represented by no less than two Counsel.
- [42] Of course, the floodgate of costs, already expended by an NGO and a litigant in his personal capacity, could have been brought to a halt upon a proper and careful consideration of the status of the matter following the AGM on the 18<sup>th</sup> of November 2021. At that stage, well-knowing that the relief sought by Hull was moot the appropriate action to be taken by the Foundation at that crucial stage (if any action was needed to be taken at all) was to apply a measured and practical approach to the question of costs. When no notice withdrawing the main application in terms of subrule 41(1)(a) was immediately forthcoming from Hull then the Foundation could and should have enquired from his attorneys whether he intended to file one. The steps taken on behalf of the Foundation, as set out above, are unfathomable.
- [43] Moreover, even having committed the cardinal error of incurring further unnecessary costs and then instituting the application in terms of subrule 41(1)(c) to recover all of its costs (on the attorney and client scale no less) the Foundation was presented with still yet another opportunity to rectify its conduct. This opportunity arose when, in opposition to the application for costs, it was tendered, under oath by Hull in his answering affidavit, that each party should pay its own costs in respect of the main application (accompanied by a tender that Hull pay the costs occasioned in respect of the amendment to his Notice of Motion in the main application). This tender, extremely reasonable in the circumstances, was rejected outright by the Foundation in its replying affidavit. In addition thereto the Foundation persisted with its claim for costs on the punitive scale in respect of both applications.

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<sup>13</sup> Erasmus: *Superior Court Practice [Service 5,2017]* D1-551.

- [44] There is one other important issue that deserves mention. That is the convenience of this Court. The judgment in this matter has been delayed somewhat longer than this Court would have hoped. In this regard, the inability of this Court to deliver this judgment sooner is solely due to the onerous workload faced by this Court in the Gauteng Division. Any delay is not due to the complexity of the issues involved despite the best attempts of this Court to deal with same as thoroughly as possible. Of course, this Court also had the benefit of being greatly assisted by most able and well prepared Counsel. Nevertheless, the application in terms of subrule 41(1)(c) has not only taken up valuable Court time on this Court's already burdened opposed motion roll but has also taken up valuable Court time in the preparation of this judgment.
- [45] The aforesaid comments of this Court should not be construed in any manner whatsoever to be a reluctance on the part of this Court to deal with disputes between parties, particularly those involving the important issue of costs. This Court is acutely aware of and strives on a daily basis to, uphold the protection of the Constitutional rights of all litigants who appear before it. In this regard, reference is made particularly to section 34 of our Constitution.<sup>14</sup>
- [46] At the same time, it is fairly trite and it has been accepted by our courts that, in appropriate circumstances, where the particular litigation has been carried out in an unsatisfactory manner and where that has resulted in an inconvenience to the Court, a Court may, in the exercise of its discretion in respect of costs, mark its displeasure by making an award of costs on a punitive scale. Despite the aforesaid and despite the inexplicable conduct of the Foundation in incurring unnecessary costs and thereafter increasing those costs considerably by the institution of the subrule 41(1)(c) application (an application with no prospects of success), thereby wasting the valuable time and resources of this Court, this Court has decided against marking its displeasure by awarding the costs payable by the Foundation on a punitive scale. Nevertheless, litigants should remain aware of the danger of not only causing pecuniary damage to that litigant's opponent by forcing the other party to incur unnecessary costs but should be conscious of the fact that the Court's time is not something which should be trifled with.
- [47] Having carefully considered all of the aforesaid, it is the opinion of this Court that, in the exercise of its general and unfettered discretion pertaining to costs, in respect of the main application, it would be just and equitable if this Court granted an order whereby each party pay their own costs. This is in fact in line with the proposal made by Hull to the Foundation in respect of these costs. Such an order would be eminently reasonable taking into account, *inter alia*, the well-intended reasons (as misguided and as unfortunate as they may have been) of both parties in entering into the main

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<sup>14</sup> **Access to courts.** -Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

application and the various disputes of fact arising therefrom. A tender was made by Hull (quite correctly) during the course of the main application to pay any costs arising as a result of the amendment to his Notice of Motion. An appropriate order will also be made in respect of those costs. Of course, the interlocutory applications instituted by both parties shall also form part of the order that each party pay their own costs since there are no valid grounds to make a specific or separate order in respect thereof. These interlocutory applications were instituted during the course of the main application and are subject to the same facts; principles and findings of this Court as those which apply, in general, to the main application.

- [48] In order to ensure that there is no possible confusion whatsoever in respect of the order that this Court will make, the order that each party pay their own costs in respect of the main application includes those costs incurred in respect thereof after the 18<sup>th</sup> of November 2021. Once again, this is in line with the somewhat generous order sought by Hull in this matter in respect of the costs incurred for the main application. This Court has declined, in the exercise of its discretion and despite the actions of the Foundation after the 18<sup>th</sup> of November 2021 in relation to the main application, to make an order that the Foundation pay the costs of the main application which were incurred after the matter became moot and before Hull withdrew the main application. In passing, it is noted that the Foundation, in the order that it sought<sup>15</sup> specifically (and rather brazenly in light of this Court's findings pertaining to the actions taken by the Foundation after the main application became moot) asked for the costs of the Foundation filing a supplementary affidavit. The costs thereof (together with other costs incurred by the parties after the 18<sup>th</sup> of November 2021 in respect of the main application) are to be borne by each party, as are the costs of the failed application by the Foundation to have the main application classified as a commercial matter and heard in the commercial court, together with the Foundation filing its Heads of Argument. In all of these instances each party shall pay their own costs.
- [49] Having made the foregoing order in respect of costs of the main application, it must follow (and this is also clear from the findings of this Court as dealt with earlier in this judgment) that the application in terms of subrule 41(1)(c) should be dismissed. It must also follow that the Foundation should be ordered to pay the costs of the application in terms of subrule 41(1)(c). There are no reasons as to why this Court should exercise its discretion in favour of the Foundation and make any other order as to costs. Once again, despite the fact that the Foundation asked this Court to grant costs on a punitive scale against Hull in respect of both applications, Hull has, very reasonably, only asked that the Foundation pay the costs of this application on the party and party scale. In the premises, it would be just and equitable if this Court simply made an order that the Foundation pay the costs of the application instituted by the Foundation in terms of subrule 41(1)(c).

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<sup>15</sup> Paragraph [19] *ibid.*

- [50] As noted earlier in this judgment the Foundation asked that Hull pay the costs of two Counsel in respect of both applications. Hull sought an order that the Foundation pay the costs of two Counsel in respect of the application in terms of subrule 41(1)(c). It was also noted earlier in this judgment that both parties had the luxury of being represented by two Counsel. No argument was placed before this Court by either party as to why, in the event of a party being ordered to pay costs, that order should not include the costs of two Counsel. In the premises, it will be ordered that the costs payable by the Foundation will include the costs of two Counsel.
- [51] Finally, it is the fervent wish of this Court that the Foundation and its members not only continue the commendable work carried out by the Foundation as before but in doing so make every effort to preserve the values and principles upon which the Foundation is based. This includes jealously safeguarding the Foundation's coffers which makes the implementation of those values and principles possible.

### **Order**

[52] This Court makes the following order:

1. Each party is to pay their own costs in the main application, such to include the costs of all interlocutory applications and any costs incurred after the 18<sup>th</sup> of November 2021, save for the costs occasioned by the amendment to the Applicant's Notice of Motion, which costs shall be paid by the Applicant in the main application (Michael Robert Hull);
2. The application in terms of subrule 41(1)(c) is dismissed;
3. The Applicant (The Free Market Foundation – South Africa) in the application in terms of subrule 41(1)(c) is to pay the costs of that application, such costs to include the costs of two (2) Counsel.



**B.C. WANLESS**  
Acting Judge of the High Court  
Gauteng Division, Johannesburg

**Heard:** 18 October 2022  
**Judgment:** 8 February 2023

**Appearances**

**For Applicant:** C Whitcutt SC (with JN van der Walt)  
**Instructed by:** Fasken Attorneys

**For First Respondent:** NM Davis SC (with E Sithole)  
**Instructed by:** Marshall Attorneys